

ARKANSAS SUPREME COURT

No. CR 05-736

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered May 11, 2006

NAKIA DAVIS
Appellant

PRO SE APPEAL FROM THE CIRCUIT
COURT OF JEFFERSON COUNTY, CR
93-541-5, HON. JOHN B. PLEGGE,
JUDGE

v.

STATE OF ARKANSAS
Appellee

AFFIRMED

PER CURIAM

Nakia Davis was found guilty by a jury of capital murder and sentenced to life imprisonment without the possibility of parole. We affirmed. *Davis v. State*, 320 Ark. 329, 896 S.W.2d 438 (1995). Subsequently, appellant filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition and appellant lodged an appeal in this court from that order. We affirmed. *Davis v. State*, CR 96-111 (Ark. September 16, 1996) (*per curiam*).

In 2004, appellant filed in the trial court a *pro se* petition to vacate and set aside the judgment pursuant to Act 1780 of 2001, codified at Ark. Code Ann. §§ 16-112-201–207 (Supp. 2003). The trial court denied the petition without a hearing, and appellant, proceeding *pro se*, has lodged this appeal. We affirm the trial court's order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146

S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Initially, the State notes that appellant failed to include his notice of appeal and his Rule 37.1 petition in his addendum as required by Ark. Sup. Ct. R. 4-2(a)(8), but did abstract the petition and other pleadings, contrary to Ark. Sup. Ct. R. 4-2(a)(5). We will, however, not require appellant to file a substituted brief to cure the deficiencies in conformance with Ark. Sup. Ct. R. 4-2(b), as it is clear on the record before us that appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

The record reflects that in 1993, the victim, Anthony Williams, was robbed and killed. He had been shot in his legs with a .25 caliber weapon and in his abdomen with a .38 caliber weapon. According to the medical examiner, Williams died from multiple gun shot wounds, but the .38 bullets in Williams' abdomen constituted the fatal shots. Appellant and Romondo Jenkins were eventually charged with the crime. Appellant admitted shooting Williams' legs with the .25 caliber weapon, but claimed he did so only in self-defense as Williams pointed a gun at appellant. No weapons were found at the crime scene. Jenkins tested positive for gun shot residue on his hands, but appellant was not tested.

Williams, who had received an insurance settlement, was last seen by his girlfriend with \$1,500 cash in his wallet, but only \$397 was retrieved from his checkbook after the shooting. During the trial, testimony elicited from Detective Roland Dorman of the Pine Bluff Police Department revealed that Detective Dorman had not submitted Williams' checkbook to be tested for fingerprints. He made this decision based on the rough texture of the vinyl outside covering and his previous

experience obtaining fingerprints from this type of surface.

In appellant's petition to vacate and set aside the judgment entered against him, he maintains that scientific testing would prove his actual innocence. Appellant contends that "advanced state-of-the-art fingerprint testing" should be conducted on the checkbook and any fingerprints found should be submitted to the Automated Fingerprint Identification System ("AFIS"). He argues such testing would prove that he had nothing to do with the crime as he would be excluded as a participant in the robbery, an essential element for the capital murder charge against him.¹ The trial court denied appellant's petition without a hearing. On appeal, appellant argues that the trial court committed reversible error when it denied appellant's petition without holding an evidentiary hearing so that the trial court would have been able to make findings of fact and conclusions of law.

Act 1780 of 2001 provides that a writ of *habeas corpus* can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. *See* Ark. Code Ann. §§ 16-112-103(a)(1) and 16-112-201--207 (Supp.2003)²; *see also Echols v. State*, 350 Ark. 42, 44, 84 S.W.3d 424, 426 (2002) (*per curiam*). There are a number of predicate requirements that must be met under Act 1780 before a circuit court can order that testing be done. *See* sections 16-112-201 to -203. The act requires a *prima facie* showing of identity as an issue at trial when a petitioner contends that he is entitled to post-trial scientific testing on the ground of actual innocence. Section 16-112-202(b)(1); *Graham v. State*, 358 Ark. 296, ____ S.W.3d ____

¹In his Rule 37.1 petition, appellant additionally sought testing of black gloves worn by the victim, Mr. Davis. Appellant apparently abandoned this claim on appeal. Issues raised below but not argued on appeal are considered abandoned. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

²Appellant filed his petition prior to the enactment of Act 2250 of 2005 with an effective date of August 12, 2005, that amended portions of the relevant statute.

(2004) (*per curiam*).

In support of his petition, Appellant submitted the affidavit of Romondo Jenkins wherein Mr. Jenkins, who was acquitted of the crime in 1995, accepts full responsibility for shooting the victim with the .38 caliber weapon. However, this confession does nothing to advance appellant's claim of either mistaken identity or innocence, as the confession neither constitutes scientific evidence nor does it exonerate appellant as an accomplice to the robbery.

Here, the identity of at least one of the shooters was not at issue, as appellant admitted that he shot the victim in the legs. As to actual innocence, the lack of appellant's fingerprints on the checkbook would not prove that he did not commit the robbery. At the most, such findings would only show that he did not touch the checkbook that contained the victim's money. The lack of appellant's fingerprints could not disprove other possibilities, such as that the victim handed over his money to his robber at his instruction, or that an accomplice to the robbery took the money from the checkbook.

Under Act 1780, testing is not authorized based on the slightest chance it may yield a favorable result. Scientific testing of evidence is authorized only if testing or retesting can provide materially relevant evidence that will significantly advance the defendant's claim of innocence, in light of all the evidence presented. *See Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004).

Appellant's petition did not meet the burden imposed by section 16-112-202(c)(1)(B) to show that the testing would produce evidence materially relevant to his assertion of actual innocence. Because he failed to state sufficient facts in his petition in order for retesting to be granted under Act 1780, the decision of the trial court is affirmed.

Finally, appellant claims that the trial court erred by failing to conduct an evidentiary hearing

on his petition and by failing to “find conclusions of law supporting the denial.” A circuit court need not hold a hearing if the *habeas* petition, files and records show that a petitioner is not entitled to relief. Section 16-112-205(a); *Graham, supra*. As appellant’s identity was not in question, the trial court did not err when it did not hold an evidentiary hearing. Moreover, Criminal Procedure Rule 37.3(a) requires a circuit court to make written findings and to specify any parts of the record relied upon if the court denies a Rule 37.1 petition without first holding a hearing, while the statutes governing Act 1780 proceedings, however, contain no similar specificity requirement.

Appellant’s claims were insufficient pursuant to Act 1780, and the circuit court was not bound to make findings of fact and conclusions of law. The trial court did not err in this regard.

Affirmed.